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Brexit and Rights

by Emily Hancox, Tobias Lock, Lenina Miller-Westoby

No doubt readers of this journal know that the UK's departure from the European Union (EU) has no immediate consequences for the Human Rights Act or indeed the UK's membership of the European Convention on Human Rights (ECHR). Brexit does, however, lead to a weakening of the human rights framework overall: not only will EU membership no longer stand in the way of withdrawal from the ECHR – a likely Tory manifesto promise for the 2020 general election – but Brexit is also likely to lead to an overall reduction in rights protection for people in the UK.

This reduction is likely to manifest itself in a number of ways. First, there is the procedural dimension. EU rights boast the full powers of EU law in that they take primacy over conflicting national laws including Westminster Acts of Parliament; in addition, every court – even as low in the hierarchy as a Justice of the Peace Court, is under an obligation to give full effect to EU rights and 'disapply' statute if necessary. Additionally, Acts of the Scottish Parliament are 'not law' if they contravene EU law. Ultimately, there is external oversight by the Court of Justice of the EU who can enter into dialogue with domestic Courts through the preliminary reference procedure (at the request of domestic courts) or hear cases brought following an investigation by the European Commission into a Member State's failure to implement or uphold EU law.

Second, there is the substantive dimension. There is no guarantee that all of the rights currently guaranteed by EU law will continue to be available to those living in the UK. These rights are guaranteed by a wide range of EU instruments. There is the Charter of Fundamental Rights, which forms part of the EU Treaties. The Charter mirrors – and sometimes updates – the rights contained in the ECHR, but goes further by stipulating additional rights, e.g. a right to the protection of personal data, children's rights and a host of provisions containing social guarantees. Admittedly, as far as the latter are concerned it is not clear in how far they are rights or mere 'principles' – a category of guarantees introduced by the Charter, the meaning of which has not yet been entirely defined by the Court of Justice. In addition, the Charter only applies where a public authority is acting within the scope of EU law and is therefore no replacement for 'proper' human rights legislation. Nonetheless it has already shown its added value compared with the ECHR in particular in the area of data protection law and it certainly has plenty of potential beyond that.

There are numerous further rights guarantees contained in EU legislation: Regulations and Directives. The former are directly applicable in the UK legal order; the latter need to be transposed into domestic law. This is normally done by way of Order in Council, i.e. secondary legislation. But some Directives have been transposed into an Act of Parliament, most prominently the Equality Act 2010. As illustrated by the 'Overview of EU rights' table below, the substantive areas in which EU law is the source of rights, is diverse. They include employment law, equality and non-discrimination, consumer and data protection, immigration, family law and asylum, environmental law and criminal justice.

So what will happen to these EU rights after Brexit? One thing is clear: they will no longer be underpinned by the UK's obligations under EU law and can therefore be amended or

repealed. On the day the UK officially leaves the EU, this would happen automatically with regard to the Charter given that the EU's treaties would no longer be applicable in the UK; the same is true for rights contained in EU Regulations. But even rights found in Directives would disappear over night if they are given effect domestically by way of statutory instruments. This is because their domestic legal basis – the European Communities Act 1972 – will in all likelihood be repealed at the same time as the date of Brexit. The only EU rights that would not be affected are those transposed into Acts of Parliament, such as the Equality Act. Any changes to the Equality Act need to be made by way of Act of Parliament too.

However, the Westminster Government has promised the enactment of a Great Repeal Bill. This is a bit of a misnomer given that the purpose of the Bill will be to enact all EU law as domestic law, so that there will be no gaps in the legal order on the day of Brexit. The Government's stated aim in this regard is to allow time for the civil service and Parliament to choose which provisions of EU law should be retained in the future and which should disappear. It is likely that most of the rights found in EU legislation will therefore continue to exist after Brexit – at least for a while. It is less clear whether rights contained in the EU Treaties will do so, in particular the EU Charter, but also rights of EU citizens. Finally, the UK is unlikely to take part in future developments of rights at the EU level. This does not mean, of course, that such rights could not be developed domestically. But the UK also stands to lose the European Court of Justice as a robust interpreter of rights.

The following overview of EU rights currently in force was compiled from position papers produced by members of the Scottish Universities Legal Network on Europe (SULNE)* which helped inform the work of the First Minister's Standing Council on Europe.

, The overview shows at one glance which EU rights there are currently on the statute book at the EU level and where they can be found. The full reports are available on the SULNE website (<http://sulne.ac.uk>). Importantly it also shows how these rights have been transposed into UK and Scots law.

* SULNE is a network of all of the Scottish University's Law Schools. It was formed following the UK's EU referendum to provide legal advice, opinion and education for all stakeholders on Scotland's current and future relationship with the EU. Its main objectives are to provide legal advice and opinion to government and other institutions engaged in difficult policy choices concerning Brexit; to facilitate an informed public understanding of the law regarding current constitutional arrangements and; to lead on legal education strategy for Scottish Law Schools following the 'leave' vote.